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IN THE

Supreme Court of the United States

October Term, 1975
No. 74-1304

FRANCIS LEO CAPPAERT, MARILYN I. CAPPAERT, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA,

STATE OF NEVADA *ex rel.* ROLAND D. WESTERGARD,
State Engineer,
Intervenor.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA

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Jurisdictional Statement

This Honorable Court has granted a writ of certiorari pursuant to 28 U.S.C. §1254(1) to review a decision of the United States Court of Appeals for the Ninth Circuit. This brief, Amicus Curiae, is respectfully submitted by the State of California, by and through its Attorney General, at the request of the State Water Resources Control Board and the Colorado River Board of California, pursuant to Rule 42(4) of this Honorable Supreme Court of the United States.

Preliminary Statement

The State of California has a vital interest in the preservation and development of its economy, an economy dependent in large part on the availability of water, including groundwater. An extension of the *Winters* doctrine to groundwater could greatly affect present expectations and rights to the use of groundwater on which the California economy largely relies. California is, therefore, vitally interested in the outcome of this case.

The State of California is also interested in any statement regarding the *res judicata* issue in this case as it may affect a case presently pending in Federal Court in California. In that case, California is asserting *res judicata* against a United States challenge of the validity of certain findings of a California water agency. California is concerned that an unnecessarily broad statement by this Court on *res judicata* could prejudice its rights in the lower court case.

ARGUMENT

I

The Winters Doctrine Should Not Be Extended to Groundwater, but if It Is, the Intent Requirement Thereof Should Be Strictly Delineated and Applied on a Case-by-Case Basis

There is no question that much of the development of the largely arid Western United States has resulted from and still depends upon the availability of water. Any change in the established system of water use poses a threat to the economy of this area. The *Winters* doctrine of reserved water rights, even as presently limited to surface flows, is a threat simply because of its attendant uncertainty and potential for social and economic dislocation. Federal reservations often have unquantified but potentially limitless claims to surface water with priority dates before established claims under State law. As a result, claimants under State law often have no assurance that their water rights will not be effectively negated by a subsequent Federal reservation claim which will nevertheless be given a priority date as far back as the mid-19th century.

If *Winters*, as presently applied, creates uncertainty, an extension of *Winters* to groundwater could create enormous chaos in the West. In 1963, over one-fifth of the nation's water needs were satisfied by groundwater and the percentage was projected to grow. In the arid West, where surface runoff is limited, irrigation places an ever greater strain on groundwater supplies. (1973 Utah Law Review 43, 46-47.) If *Winters* were extended to groundwater at this late date after years of established groundwater use by State claimants, then not only would the federally reserved lands have a

groundwater right with a priority date dating back perhaps to the last century, but longtime State pumpers on the same groundwater basin but with a later priority date would suddenly have their rights severely prejudiced. In many Western States where Federally reserved lands constitute a major portion of the total area, almost all overlying owners would be affected given the large area covered by many groundwater basins. Furthermore, in states like Arizona and California where appropriative rights to percolating groundwater do not exist for overlying lands, it may be argued that no overlying pumper could have a priority date and all would be inferior to any Federal claims.

These consequences have dictated Amicus State of California's concern in this case. Amicus generally supports the position urged by petitioners that the *Winters* doctrine not be extended to groundwater. If it is, however, Amicus contends that its application in particular cases must be limited by the intent requirement of *Winters*. Such limitation should be delineated by this Court so as to avoid future uncertainty, and it is to this issue that Amicus will now address itself.

This Court may well decide to extend the *Winters* doctrine of reserved water rights to groundwater as well as to surface water. Such an extension, however, should still involve a case-by-case analysis to see whether the requirements of the *Winters* doctrine were met. It is the position of Amicus Curiae, State of California that, a major requirement of *Winters*—implied intent—could not be met in cases involving reservations of land occurring before the 1920's and that this Court should qualify in that way any general extension of the *Winters* doctrine to groundwater.

Winters v. United States, 207 U.S. 564 (1907) and its line of cases each involve a reservation of land for government purposes by treaty, Congressional statute, or executive order in which no express reservation of water rights was made. The courts found in each case an implied reservation of the usufructuary right to sufficient surface water to satisfy the purposes, and attendant needs, for which the reservation of land was made. *Winters v. United States, supra; Conrad Investment Company v. United States*, 161 Fed. 829 (9th Cir. 1908); *United States v. Powers*, 305 U.S. 527 (1939); *United States v. Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939); *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956); *Arizona v. California*, 373 U.S. 546, 601 (1963); *United States v. District Court for Eagle County*, 401 U.S. 520 (1971). Finding such an implied reservation centers around the intent to reserve water that must be attributed to the Federal government in reserving the land. The court in *United States v. Walker River Irrigation District, supra*, in referring to the reservation of lands for the Walker River Indian Reservation, said at page 336:

> "The intention had to be arrived at by taking account of the circumstances, the situation and needs of the Indians and the purpose for which the lands had been reserved."

The attribution of intent requires the court to find that the Federal government must have had such an unexpressed intent in light of the circumstances, as articulated in the *Walker River* case. In the series of cases finding an implied reservation of water for Indian reservations, consistently similar circumstances allowed

the courts to find an intent to reserve water. These circumstances included the following: a government purpose to facilitate a change in the Indian way of life from nomadic to sedentary and pastoral, involving cultivation of the land and raising of animals; the fact that the land set aside for such purpose was arid but that the contemplated uses nevertheless involved the extensive need for water to irrigate crops, water livestock, and consume domestically; and finally, the presence on the reserved land or along its boundaries of a surface water flow capable of fulfilling its water needs. *Winters v. United States, supra; Conrad Investment Company v. United States, supra; United States v. Powers, supra; United States v. Walker River Irrigation District, supra; United States v. Ahtanum Irrigation District, supra; Arizona v. California, supra.* Under these circumstances, it was not difficult for these courts to conclude that the Federal government must have been aware of the need for water on the reserved lands and therefore must have intended to reserve water from the riparian surface flows for use on those lands.

The same cannot be said about groundwater. The Indian reservations in the above cases were all constituted of lands reserved in the period from 1855 to 1917. During this period, groundwater was not yet looked to as a well-defined, viable, or economical source to meet large demands, such as those of irrigation on these reservations. Geohydrologic knowledge as to the nature, extent, and location of groundwater supply was not yet highly developed. Only when this knowledge increased and technology for the capture of groundwater improved some years after the turn of the century did groundwater play a more important role in water planning and use. The drought of the 1930's dried up

surface water sources and gave more impetus to the development of groundwater. Similarly, World War II demands for water at little expenditure of time, money, and critical materials tended to favor groundwater extraction over the development of surface water sources. Since then, the upward trend in groundwater development has continued. (Joseph L. Sax, *Water Law* (1965), pp. 240-241, quoting from "Water Supply Paper 1800," pp. 23-28, 77-78, 110-111 (1963), U.S. Geological Survey.)

Since groundwater was not looked to as well-defined, viable, or economical as a large supply source during this period when much land was set aside for Indian reservations, it would be difficult, if not impossible, for a court to attribute to the Federal government reserving such lands any intent to reserve groundwater for use upon them. In fact, none of the *Winters* doctrine cases cited earlier even mentioned groundwater as an additional or alternative source to surface stream flow, although alternative sources, such as natural springs, were urged in one case by a party opposing any implication of reserved surface flow rights. *Winters v. United States, supra.* What seems apparent is that the speculative possibility of an available groundwater supply underlying reserved lands had no effect on Federal government decisions to reserve those lands up until at least the 1920's and that the fact that such groundwater potential was not even mentioned in heavily contested cases over surface waters allegedly reserved during the same period shows that people realized that groundwater was not considered by the Federal government. It seems clear, therefore, that before the 1920's no court could reasonably attribute any intent to reserve groundwater to the Federal government regarding

any reservation of land where water needs were great. Therefore, while the *Winters* doctrine may include groundwater, it can in application only result in implied reservations of such groundwater for Federal government actions taking place well into the present century.

Amicus State of California knows of only two previous cases in which the possible extension of the *Winters* doctrine to groundwater has been considered. In *Nevada ex rel. Shamberger v. United States,* 165 F. Supp. 600 (USDC, Nevada, 1958), the court held that there was an implied reservation of groundwater rights for 200,000 acres of land reserved as the Hawthorne Naval Ammunition Depot in Nevada. However, this land was reserved over the period of 1926 to 1935, at the time when groundwater was first given heed as a potential water source. Therefore, the court could have reasonably attributed the necessary intent to the Federal government. It should be noted, however, that this case was eventually affirmed on another ground, lack of consent to sue the United States. *Nevada ex rel. Shamberger v. United States,* 279 F.2d 699 (9th Cir. 1960).

The other *Winters* groundwater case, *Tweedy v. Texas Company,* 286 F.Supp. 383 (USDC, Montana, 1968), did not actually hold that *Winters* applied to groundwater, deciding the case on the ground that even if it did, the reserved right claimants had shown no need or use for the groundwater and thus had no protectible rights. In *Dictum,* however, the court said, at page 385:

> "When the Blackfeet Indian Reservation was created, the waters of the reservation were reserved for the benefit of the reservation lands (cite *Winters*). The *Winters* case dealt only with the surface water, but the same implications which led the Supreme Court to hold that surface waters had been reserved would apply to underground waters as well. The land was arid—water would make it more useful, and whether the waters were found on the surface of the land or under it should make no difference."

In this case, the land was apparently reserved no later than 1908, at a time when groundwater was not highly considered as a water source. Amicus, State of California, would therefore urge that the court in *Tweedy* is incorrect in remarks as to an implied reservation. Amicus would further note that the court recites no facts indicating that any underlying groundwater source was known to the Federal government at the time it reserved this land. This is in contrast to the *Winters* surface water cases in which streams were recited as flowing across or alongside the reserved land. What the *Tweedy* court appears to have done, therefore, is to glibly posit the application of *Winters* without analyzing whether the intent requirement of *Winters* really applies to the factual context of the case before it.

In view of the severe social disruption that will result from application of the *Winters* doctrine to groundwater, Amicus, State of California, urges that this Honorable Court not so extend that doctrine. If, however, the *Winters* doctrine is generally applicable, we urge the Court to declare the necessity of finding an intent to reserve groundwater at the time the reservation was made and to declare that such intent must be based on evidence of the knowledge of groundwater basins, the extent of technology for extracting groundwater, and the general opinion as to the feasibility of groundwater as a large supply source that existed at that time.

II

The Administrative Decision of the Nevada State Engineer Was Not One Which Could Operate as a Res Judicata Bar to the United States Action Against the Cappaerts

We think it clear that, under appropriate circumstances, the doctrine of *res judicata* is applicable to administrative decisions. In *United States v. Utah Const. & Mining Co.*, 384 U.S. 394 (1966), for example, the Court concluded that the doctrine of *res judicata* is applicable to administrative decisions, even where the United States was a party. As the Court noted:

> "Occasionally courts have used language to the effect that *res judicata* principles do not apply to administrative proceedings but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." 384 U.S. at pp. 421-22.

Since *Utah Construction*, the federal courts have frequently applied the principles of *res judicata* to final federal administrative decisions. See, *e.g., Safir v. Gibson*, 432 F.2d 137 (2nd Cir. 1970); *Painters District Council v. Edgewood Contracting Co.*, 416 F.2d 1081 (6th Cir. 1973); *Tipler v. DuPont Co.*, 443 F.2d 125 (6th Cir. 1973); *Paramount Transport Systems v. Chauffeurs, etc., Local 150*, 436 F.2d 1064 (9th Cir. 1971); see also *Hobby v. Hodges*, 215 F.2d 754 (10th Cir. 1954). Other cases have applied the same principles to federal court review of *state* administrative

agency decisions. *Groom v. Kawasaki Motors Corp.*, 344 F.Supp. 1000 (W.D. Okl. 1972); *United States v. Fallbrook Public Utilities District*, 165 F.Supp. 806 (S.D. Cal. 1958). Indeed, the *Fallbrook* case is the closest analogy of which we are aware, to the position asserted by the petitioners here.

Lower federal appellate courts have recognized, however, that the doctrine of administrative *res judicata* is not one which may be applied unblinkingly to each and every factual situation. In *Grose v. Cohen*, 406 F.2d 823 (4th Cir. 1969), for example, the Fourth Circuit concluded that *res judicata* effect should not be given to a decision containing "error on the face of the evidence." The Ninth Circuit itself has established a similar rule, by concluding:

> "[C]ollateral estoppel effect should be given only to those administrative determinations that have been made in a proceeding fully complying with the standards of *procedural and substantive due process* that attend a valid judgment by a court and further, that such effect should be accorded only to those findings upon material issues that are supported by *substantial evidence* on the administrative record as a whole." *Paramount Transport Systems v. Chauffeurs, etc., Local 150, supra*, 436 F.2d 1064, 1065-66 (Emphasis added).

The cases from the Fourth and Ninth Circuits are consistent with several cases from this Court. In *Pearson v. Williams*, 202 U.S. 281 (1906), the Court refused to give *res judicata* effect to a decision of an immigration board of special inquiry, in part on the grounds that the board conducted a summary proceed-

ing, and could not compel witnesses to attend. In a later case, however, where the administrative hearing was clearly proper, the findings were based upon substantial evidence, and the orders were within the jurisdiction of the administrative agency, the Court applied the doctrine of administrative *res judicata*. *Sunshine Anthracite Coal Company v. Adkins*, 310 U.S. 381 (1940).

After analyzing these cases, as well as the various policy factors which underlie the doctrine of *res judicata*, Professor Davis has concluded:

> "The sound view is therefore to use the doctrine of res judicata when the reasons for it are present in full force, to modify it when modification is needed, and to reject it when the reasons against it outweigh those in its favor." Davis, *Administrative Law Treatise*, Vol. 2, §18.02.

Davis further notes:

> "The reasons behind the doctrine as developed in the court system are fully applicable to some administrative proceedings, partially applicable to some, and not at all applicable to others. As a matter of principle, therefore, the doctrine should be applied to some administrative proceedings, modified for some, and rejected for others." *Id.* §18.12.

We believe this analysis to be sound, and urge the Court to adopt it here.

If the Court rules against Nevada's position on the issue of administrative *res judicata*, however, we urge the Court not to reject the doctrine in broad terms. Rather, we urge the Court in that event to confine

its holding to the limited facts of this case. In this connection we note the United States, against whom Nevada seeks to apply that doctrine, was not the applicant in the proceeding before the State Engineer, but rather was the opponent of the application. The Ninth Circuit apparently regarded this distinction as critical, for it noted that "the United States was neither a defendant nor served with process in the proceedings before the State Engineer." Slip Opinion, 12.

There are several reasons which militate against the application of the doctrine of administrative *res judicata* to those who oppose an application for a permit to appropriate water, as opposed to the applicant himself. First, the opponents of the application are primarily motivated merely to oppose a pending application, not to thoroughly litigate the underlying validity of their own claims. Thus, to bar such persons from later asserting their own claims may have the effect of discouraging informed participation in such proceedings.

Second, to bar such persons from later asserting their own claims may have the effect of unduly encouraging litigation. If each participant in the administrative proceeding risks the binding nature of the administrative decision because of his appearance in the proceeding, each participant must initiate proceedings in the appropriate court if there is any possibility, however slight, that the administrative decision may at some future time affect his rights. Only by such action could the protestant insure that the administrative decision, however erroneous, would not be binding upon him. Thus, to apply the doctrine of administrative *res judicata* to such persons may encourage an increased number of legal actions seeking to review State administrative decisions.

Thus, if the Court rules against Nevada's position on the issue of administrative *res judicata,* we urge the Court not to repeat the broad comment of the Ninth Circuit on that issue. In particular, the lower court stated that, "[a]lthough the State Engineer may have expertise in the administration of Nevada's water laws, there is not evidence that he is qualified to consider or decide the complex issues of federal law involved in this case." Slip Opinion, 13. This statement might be taken to assume that State administrative agencies have no expertise to determine the water needs of the United States under federal law, even when the United States is the applicant for a permit to appropriate water for federal purposes. This result would immunize the United States from the doctrine of administrative *res judicata,* even when it initiates the proceedings before the State agency and is given a full opportunity to present its case.

Our interest on this issue derives primarily from an action now pending in a federal district court in California. See *United States v. California,* S-3104 (E.D. Cal.). In that case, the United States applied to the California Water Resources Control Board for a permit to appropriate water for storage at the New Melones Dam on the Stanislaus River. The State agency conducted a lengthy hearing on the application of the United States, involving the testimony of many witnesses and the production of numerous exhibits. After the hearing, the State agency granted the permit, subject to certain conditions. The United States never sought judicial review of the agency's decision and the decision became final under California law. The United States later filed its action against California in the federal court, claiming that the State agency exceeded its power under section 8 of the Reclamation Act of 1902. 43 U.S.C. §383. One of the issues in the case is whether the evidence supports the findings of the State agency, which led to the conditions in the permit. California asserts that the United States is now precluded, by the doctrine of administrative *res judicata,* from challenging the validity of these findings. Since the United States initiated the proceeding before the State agency by applying for a permit, that case is distinguishable from the instant case, where the United States simply appeared in opposition to the Cappaerts' application. Thus, an overly broad comment on the doctrine of administrative *res judicata* in this case may have an undue effect on the California case, and is, moreover, not warranted by the facts of this case.

In any event, we urge the Court to reaffirm the holding of *United States v. Utah Const. & Mining Co., supra,* 384 U.S. 394, that under appropriate circumstances, the doctrine of *res judicata* applies to administrative determinations. A broader comment is not warranted by the limited facts of this case.

Conclusion

For the foregoing reasons, it is respectfully requested that the decision of the Court of Appeals be reversed as to the extension of the *Winters* doctrine to groundwater; but if it not be reversed, that this Court limit said extension as heretofore delineated. It is also respectfully requested that irrespective of its conclusion as to the applicability of *res judicata* in this case, this Court affirm the general application of this rule of law to state administrative hearings.

Respectfully submitted,

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